84-1440

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NO._____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

ALWIN E. HOPFMANN, GREGORY HESSION,
CLARENCE PERKINS, CLARENCE PAULIN,
and BETH SULLIVAN,

Appellants,

v.

MICHAEL JOSEPH CONNOLLY,
FRANCIS X. BELLOTTI, CHESTER G. ATKINS,
and THE DEMOCRATIC STATE COMMITTEE OF
MASSACHUSETTS,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE FIRST CIRCUIT

Appendix, Vol.1

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E.HOPFMANN, ET AL.,

Plaintiffs, Appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

[Hon. John J.McNaught, U.S. District Judge]

Before

Campbell, Chief Judge,

OB 1

Cowen,* Senior Circuit Judge,

and Bownes, Circuit Judge.

October 22, 1984

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* Of the Federal Circuit,sitting by designation.

COWEN, Senior Circuit Judge. This is an appeal from an order of the District Court for the district of Massachusetts which dismisssed appellants' (plaintiffs') complaint. The principal plaintiff, Alwin E. Hopfmann, was an unsuccessful candidate for the Democratic nomination for the office of United States senator in 1982. He, and four individuals who desired to vote for him, brought this action in the district court against the Secretary of

the Commonwealth of Massachusetts (defendants). Plaintiffs sought injunctive and declaratory relief, claiming that a cornucopia of constituional rights were violated when Hopfmann's name was excluded from the ballot in the Democratic primary. For the reasons to be set forth, we affirm the decision of the district court.

I.

This action is basically an attack on the constitutionality and validity of Article Six, Section III of the Charter of the Massachusetts Democratic Party (the 15 percent rule), which provides that only those candidates who receive 15 percent of

the vote on any ballot at the convention may challenge the convention's endorsement in a state primary election. In 1982, Hopfmann failed to obtain 15 percent of the vote and the Secretary of the Commonwealth of Masssachusetts ordered his name excluded from the primary ballot. The filing of the complaint followed this action.

After the filing of the complaint, defendants filed motions to dismiss. On June 24, 1982, proceedings were stayed pending the decision of the Massachusetts Supreme Judicial Court in the related proceeding of Langone v Secretary of the Commonwealth. A three-judge panel was convened to consider the issues, brought

under the Voting Rights Act, 42 U.S.C. Sec. 1973, and on July 7, 1982, plaintiffs' application, seeking a stay of the denial of preliminary relief and an order directing the Secretary of the Commonwealth to place Hopfmann's name on the Democratic ballot, was denied by Justice Brennan. After resubmittal, it was denied by Justice Rehnquist on July 9, 1982. Hopfmann's petition for a writ of habeas corpus (requesting that his name be placed on the democratic primary ballot) filed September 20, 1982, was denied by the full United States Supreme Court on October 18, 1982. Plaintiffs' petition for a writ of prohibition and/or mandamus and/or injunction, requesting that

Hopfmann's name be placed on the Democratic primary ballot, filed September 30, 1982, was denied by the United States Supreme Court on November 29, 1982. Plaintiffs' application, filed October 25, 1982, seeking a stay of the general election or, in the alternative, a special Primary election, was denied by Justice Brennan on October 26, 1982. After resubmittal, it was again denied,by the full United States Supreme Court, on November 1, 1982. Plaintiffs' applications, filed November 5, 1982, to enjoin the Governor of Massachusetts from certifying the election of Senator Edward M. Kennedy and the United States Senate from seating him, were also denied by the

United States Supreme Court.

A copy of the opinion of the Masachusetts Supreme Judicial Court in Langone v Secretary of the Commonwealth, 446 N.E. 2d 43 (Mass. 1983), was filed with the district ocurt on February 23, 1983. On April 8, 1983, a copy of the order of the United States Supreme Court, dismissing the appeal in that case and denying the alternative petition for certiorari was filed with the district court. Langone v. Connolly, 103 S.Ct. 1510, 75 L.Ed. 2d 938 (1983).

On April 9, 1984, the district court, treating defendants' motions to dismiss as motions for summary judgment, granted them and dismissed the complaint.

II.

Here, as in the court below, plaintiffs' principal attack on the 15 percent rule is the contention that the enforcement of the rule violates their rights under the First and Fourteenth Amendments to the United States Constitution. The parties are agreed that Hopfmann had complied with the state statutory requirement (Mass. G.L. c. 53) for having his name placed on the primary ballot. To comply with state requirements, candidates must submit nomination papers signed by 10,000 voters. Specifically, plaintiffs argue that since this statutory requirement had been met,

the denial of Hopfmann's access to the ballot in the primary election and the deprivation of the rights of the remaining parties to participate in choosing the party's candidate, abridged rights guaranteed to them by the First and Fourteenth Amendments.

As stated above, proceedings in the district court were stayed pending the decision in Langone v. Secretary of the Commonwealth, supra, which was decided February 16, 1983. Contrary to plaintiffs' position in this appeal, the Supreme Judicial Court of Massachusetts held in that case that G.L. c. 53 incorporated the 15 percent rule, and that the rule did not deprive candidates or

voters of their rights of free speech, association, due process, or equal protection guaranteed to them by the First and Fourteenth Amendments of the United States Constitution. The United States Supreme Court summarily dismissed the appeal from that decision for want of jurisdiction in April 1983. Langone v. Connolly, supra. The district court's decision in this case was largely based on the decision of the Supreme Judicial Court and the dismissal of the appeal in that case by the United States Supreme Court.

Relying on Hicks v. Miranda, 422 U.S. 332, 344 (1975), defendants urge that the dismissal of the appeal by the United States Supreme Court for lack of

jurisdiction, i.e., for want of a substantial federal question, is a decision on the merits which is binding on this court and is dispositive of the First and Fourteenth Amendment claims. Citing Maryland v. Baltimore Radio Show, 338 U.S. 912, 919 (1950), plaintiffs respond that it is not clear that the Supreme Court's decision was a dismissal of the appeal, and instead, may be construed as a denial of the petition for certiorari. Consequently, they argue that the decision has no precedential value in this court.

We agree with the contentions of the defendants. In Langone v. Connolly, the

appellants couched their jurisdicitonal statement in the alternative, requesting that the statement be treated as an appeal under 28 U.S.C. Sec. 1257(2),and to the extent that the statement would not be considered an appeal under that subsection, they requested that it be treated as a petition for certiorari under 28 U.S.C. Sec. 1257(3). The order of dismissal of the United States Supreme Court stated:

> The appeals are dismisssed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied. [emphasis added.]

We find that the circumstances in Langone v. Connolly show that plaintiffs'

application to the United States Supreme Court was treated as an appeal under 28 U.S.C. Sec. 1257(2) and dismissed. The dissent of Justsice Stevens, in which Justice Rehnquist and Justice O'Connor joined, leads us to that conclusion. The dissent of Justice Stevens stated in part:

> These appeals present substantial, unresolved questions regarding the accommodation of competing First Amendment values; the interests of would-be candidates and voters in eligibility for the ballot,andl the interests of party members in political association without undue governmental intrusion.***
>
> The case is properly before this Court on appeal. ***

75 L.Ed 2d at 938 and 939.

The language in the majority's dismissal of the petition is understandable when read in conjunction with appellants' jurisdictional statement. We think that the majority of the Supreme Court was taking an extra precaution to deny the application in toto, since the order stated that the appeal was dismissed for lack of jurisdiction, but that if the papers were treated as a petition for certiorari, the petition was also denied.

In holding that the decision of the United States Supreme Court in Langone v. Connolly is final and binding, we are mindful of Justice Brennan's concurring opinion in Mandell v. Bradley, 432 U.S. 173 (1977), giving narrow scope to summary dispositions by the United States Supreme Court. In pertinent part, that opinion states:

> After today, judges of the state and federal systems are on notice that before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions were the same and if they were, (b) determine that the judgment in fact rests upon decision of those questions, not even arguably upon some alternative nonconstitutional ground." The judgment

> should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible. [432 U.S. ata 180]

an examination of the appellants' jurisdicitonal statement clearly shows that the same constitutional questions which are raised by plaintiffs' First and Fourteenth Amendment claims in this case, were at issue in Langone v. Secretary of the Commonwealth, and that the judgment of the court in that case rested upon a decision of those constitutional questions.

III.

Plaintiffs maintain that even if this court holds that the United States Supreme Court action in Langone v. Connolly is

dispositive of their First and Fourteenth Amendment claims, they are still entitled to prevail, because the enforcement of the 15 percent rule violates Article I, Section 4, Clause 1, Article 1, Section 3, Clause 3, and the Seventeenth Amendment of the Constitution.

We consider first the claim based on Article I, Section 4, Clause 1. This clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.

According to plaintiffs, this provision mandates that the state legislatures alone

may prescribe the conditions under which elections are held. Therefore, they declare that the imposition of any conditions on elections for the United States Senate by any entity other than the state legislature, such as the Democratic Party through the 15 percent rule, is an unlawful usurpation of the state legislature's constitutional prerogative.

This argument reaches too far. Plaintiffs theory rests on the proposition that no power to impose restrictions on regular or primary elections may be delegated to political parties by the state legislature. Such an extreme interpretation, if adopted with respect to primary elections, could effectively

destroy the ability of political parties to select members of their own choice--a right implicit in the freedom of association guaranteed by the First and Fourteenth Amendments of the Constitution. See Rodriguez v. Popular Democratic Party, 457 U.S. 1 (1982); Democratic Party of the United States v. Wisconsin, 450 U.S.107 (1981); Cousins v. Wigoda, 419 U.S. 477 (1975).

The potential for interference with the State Democratic Party's ability to select the candidate of its members' choice is apparent from the statutory rules governing primary elections in Massachusetts. These rules provide that nomination papers for the primary ballot

may be signed by 10,000 registered voters, whether or not they are enrolled party members, G.L c. 53, Sec. 46, and that both enrolled party members and unenrolled registered voters may vote in the primaries, as long as they enroll at the polls just before receiving ballots. G.L. c. 53, Sec. 37. Thus, as was pointed out in Langone v. Secretary of the Commonwealth, 446 N.E. 2d at 46:

> ***if the only requirements for primary ballot access were the existing Massachusetts statutory requirements unaugmented by party rule, "a candidate for statewide election could be placed on the general election ballot as the Democratic Party candidate, with little or no support from the regular party membership." Id. 385 Mass. at at 1205, 434 N.E. 2d 960. The Justices concluded that this

> would substantially infringe the Democratic Party's right of freedom of association, id. at 1206, 434 N.E. 2d at 960, and the Commonwealth's interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidates in the general election will be.

In that case, the Supreme Judicial Court of Massachusetts construed G.L. c. 53 as "not to exclude, but rather, to accomodate the 15 percent rule." 446 N.E. 2d at 51.

Plaintiffs' interpretation of Article I, Section 4 also runs contrary to other decisions on the point, which have found it unobjectionable for state legislatures to delegate some of their regulatory authority over primray election balloting

to state political parties. Skeen v. Hooper, 631 F.2d 707 (10th Cir. 1980); Tansely v. Grasso, 315 F. Supp. 513 (D.Conn. 1970); Clark v. Rose, 379 F. Supp. 73, 77 (S.D.N.Y. 1974).

Accordingly, we hold that the 15 percent rule represents merely a rule promulgated by authority which has been delegated by the state legislature, and is in no way violative of Article I, Section 4 of the Constitution.

IV.

Plaintiffs next argue that the application okf the 15 percent rule transgresses Article I, section 3, Clause 3 of the Constitution in that it unlawfully adds a qualification for the

office of United States Senator beyond the age, citizenship and residency requirements of the Constitution.

As the defendants have correctly pointed out, the 15 percent rule does not add a qualification that precludes Hopfmann from obtaining the office of United States Senator. The rule merely adds a restriction on who may run in the Democratic partay primary for sttewide political office and potentially become the party nominee. The cases cited by plaintiffs to the effect that neither Congress nor the states can add to the constitutional qualifications for office are ianapposite. Cf. Powell v. McCormack, 395 U.S. 486,547,551 (1969).

Unlike the additional requirements involved in the cases cited by plaintiffs, failure to comply with the 15 percent rule does not render a candidate ineligible for the office of United States Senator. An individual is free to run as the candidate of another party, as an independent, or as a write-in candidate. If he is elected and meets the requirements of Article I, Section 3, he will be qualified to take office. As the Wyoming Supreme Court stated in State v. Crain, 197 P.2d 864, 871 (Wyo.1948), the test to determine whether or not the "restriction" amounts to a "qualification" whithin the meaning of Article I, Section 3, is whether the candidate "could be elected if his

name were written in by a sufficient number of electors."

If plaintiffs' position were accepted, it would invalidate most of the state regulatory statutes, such as G.L. c. 53, which also restricts ballot access by requiring, among other things, that each candidate must submit nominating papers signed by at least 10,000 registered voters. Similar statutes have been upheld by the Supreme Court as an adjunct to the states' regulatory powers under the times, place, and manner" clause of Article I, Section 4, in order to insure that "some sort of order, rather than chaos, is to accompany the democratic processes." Storer v. Brown, 415 U.S. 724, 730

(1974); see also Rosario v. Rockefeller, 410 U.S. 752 (1973).

We therefore conclude that the 15 percent rule cannot be said to violate Article I, Section 3, Clause 3.

V.

Plaintiffs' final contention is that the 15 percent rule violates the Seventeenth Amendment to the Constitution, which provides in pertinent part:

> The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.

Plaintiffs insist that the 15 percent rule contravenes this provision, because the rule applies only to candidates for statewide office, whereas the election of

state representatives is not governed by the rule.

This contention was not raised below by plaintiffs , and is not properly before this court. See Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 73 (1st Cir. 1979); Johnston v. Holiday Inns, Inc., 595 F.2d 890, 894 (1st Cir. 1979).

However, if it is assumed arguendo that the contention is properly before us, we find that it is entirely lacking in merit. The 15 percent rule does not impose a qualification on voters for participation in elections for United States Senator which does not apply to voters in elections for United States Senator which does not apply to voters in

elections for representatives in the state legislature. As previously stated in this opinion, the 15 percent rule only imposes a restriction on those who wish to participate in the primary of the Democratic party and to obtain that party's nomination, whether they be candidates for the United States Senate or for the lower house of the state legislature. We repeat that any individual who fails to meet the requirements of or is dissatisfied with the 15 percent rule has the opportunity to run as a candidate of another party, as an independent, or to conduct a write-in campaign. Forsenius v. Harman, 235 F.Supp. 66 (E.D. Va. 1964), relied on by

plaintiffs, is inapposite. In that case, the state statute provided that no voter would be entitled to vote in any federal election unless he offered proof of continuing residence by filing a certificate in the time and manner prescribed by the state law.

AFFIRMED.

ORDERS BELOW

Order Affirming District Court's Dismissal

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317

ALWIN E. HOPFMANN, ET AL.,
Plaintiffs, appellants,

v.

MICHAEL JOSEPH CONNOLLY, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: October 22, 1984

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts,

and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: the judgment of the District Court is affirmed.

By the Court:

Francis P. Scigliano

Clerk

Order Denying Rehearing

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1317.

ALWIN E. HOPFMANN, ET AL.
Plaintiffs, Appellants

v.

MICHAEL JOSEPH CONNOLLY, ET AL.
Defendants, appellees.

BEFORE

CAMPBELL, Chief Judge,
COWEN* Senior Circuit Judge,
COFFIN, BOWNES, BREYER AND TORRUELLA,
Circuit Judges.

ORDER OF COURT

Entered: December 10, 1984

Upon consideration of "Petition for Rehearing and Suggestion for Rehearing En Banc", which document was submitted to the members of the panel and to the judges of the Court who are in regular active service; and

The judges of the panel having voted to deny the petition for rehearing, and

the judges of the Court who are in regular active service having voted against rehearing en banc,

It is orderd that said application for hearing en banc is hereby denied.

By the Court,

Francis P. Scigliano

Clerk.

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* Of the federal Circuit, sitting by designation

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ALWIN E. HOPFMANN, ET AL,

Plaintiffs,

v. CIVIL ACTION NO. 82-1530-MC

CIVIL ACTION NO. 84-393-MC

MICHAEL JOSEPH CONNOLLY, ET ALS,

Defendants.

MEMORANDUM AND ORDERS DISMISSING COMPLAINTS

McNAUGHT, D. J.

In his complaint in 1982 Mr. Hopfmann,who sought to be a candidate in the Democratic primary for United States Senator, but was excluded from the ballot for failure to obtain the 15 percent of the votes cast at the Democratic Party Convention, attacked the validity of the the "15% Rule" for the first time. (The Rule requires that if a person is to run in a party primary, he or she must have received 15% of the votes on any ballot at the Convention endorsing the candidates.) His was not the only challenge to the

Rule. Frederick C. Langone brought an action in the courts of the Commonwealth of Massachusetts. Eventually the Supreme Judicial Court held that the 15 Percent Rule was not excluded by Chapter 53 of the Masachusetts General Laws; that the statute accommodated the Rule and that the Rule was not constitutionally invalid. Appeals were taken to the Supreme Court of the United States. Those were dismissed for want of jurisdiciton. Certiorari petitions were denied.

At the hearing on the issuance of a preliminary injunction on the 1984 complaint (in February of this year), the parties agreed that the matters submitted to the three-judge court on the 1982

complaint are no longer pending. They have been resolved. Defendants contend that no substantive issues remain for resolution by me as the single judge assigned to the action. Plaintiffs disagree. In early 1983, I asked that a statement of issues (for the single judge) be submitted by plaintiffs . It was filed February 9, 1984.

Motions to dismiss both actions (treated now as motions for summary judgemetn) were taken under advisement, once the parties had an opportunity to submit written arguments and briefs. After deliberation I conclude and rule that judgment for defendants must be entered in both cases.

With respect ot the civil Action No. 82-1530-MC, I am in agreement with the decision of the Supreme Judicial Court upholding the Rule's validity, and for the reasons expressed therein. Extensive repetition of those reasons is unnecessary. See Langone v. Secretary of the Commonwealth, 446 N.E.2d 43 (Mass. 1982f). The analysis of the right to associate with a political party, protected by the First and Fourth Amendment ot the United States Constitution, the interest of a party in ensuring that its members will have an effective role in deciding who will appear as a party's candidate, the fundamental right of association in a political party

and the integrity of the election process are all discussed as factors which do not require preclusion of the Rule as obstacles, but provide foundations for it. The Supreme Judicial Court cited Democratic Party of United States v. Wisconsin, 450 U.S. 1007 (1981) as authority for the proposition that the Rule requiring a modicum of support from members with substantial affiliation with the party is one mode of assuring freedom of association--association with the ability to limit control of its decisons to those sharing its interests. It was said, (and properly), that although the Rule has some impact on voters' rights and those of candidates, access to the ballot

was not denied unfairly.

Plaintiffs' claims were rejected by the Supreme Court (April 4, 1983). Appeals were dismissed and certiorari denied. No substantive issue remains to be determined. Plaintiffs' Article I, Sec. 4 claims have been rejected twice by a Single Justice of the Supreme Court. There is no substantial federal question to be determined and the action is dismissed on its merits.

The complaint in civil Action No. 84-393 was filed February 10, 1984. In a statement of reasons for denial of a preliminary injunction filed February 21 of this year, I wrote:

As stated hereinbefore, the plaintiff

in the second action does not concede the validity of the 15 Percent Rule. Indeed, it is specificallky averred in Paragraph XXXV that the "15 Percent Rule is an unconstitutional act", and elections thereby affected are "void" and a new special election should be held. Mr. Hopfmann, as a would-be candidate for the office of United States Senator from the Commonwealth of Massachusetts and as a voter, asserts that if the Rule is not invalid, it should be applied to all candidates for the office of President of the United States and for the office of United States Senator from Massachusetts; that it

should be applied not only to Democrats but to Republicans as well; that all persons who are candidates or "who have announced that they are thinking" of becoming candidates for the office of President of the United States or the United States Senate should be enjoined "until they comply with the 15 Percent Rule of the Democratic Party" from participating in any primary. He would have this Court enjoin the Secretary of the Commonwealth and the Director of Elections to remove all names from the presidential primary ballot in March, and to order the Republican State Committee also to enforce the

"15 Percent Rule".

If Mr. Hopfmann is denied preliminary relief and the 15 Percent Rule remains in effect, the rule will be applied to him and to all other potential candidates at the Democratic party's primary convention, scheduled to be held in June in the Commonwealth of Massachusetts. Should he fail to meet the requirements of the 15 Percent Rule, the Secretary of the Commonwealth will not allow his name to appear upon the printed primary ballot. Mr. Hopfmann will have suffered harm at that time. On the other hand, if an injunction as

requested in this action is granted, the campaigns of all candidates for the presidency will be disrupted, as well as the campaigns of all candidates for the United States Senate from Massachusetts (Democrat and Republican alike). The public interest in orderly timely elections will be disrupted as well. A balance of these factors militates against the issuance of an injunction.

The reasons that I gave at that time for the conclusion that the plaintiffs had not shown a likelihood of success on the merits afer further study, provide the basis for the conclusion that the judgment must enter in favor of the defendants.

His contention that the 15 Percent Rule is invalid has been testedinthe past, and found wanting. It has been the subject of adverse opinion by the Supreme Judicial Court of Massachusetts, and the Supreme court of the United States thereafter dismissed appeals and denied certiorari. On two other occasions, single justices of the Supreme Court of the United States have failed to find merit in his claims. Secondly, he asks to have a rule of the State Democratic Committee applied to persons seeking the Republican nomination. There will be no Republican nominating

convention in Massachusetts in 1984. Neither the State nor this Court can enforce a Democratic 15 Percent Rule upon the Republican party. Thirdly, Mr. Hopfmann seeks to have the 15 Percent Rule of the Democratic Party applied to candidates for the presidency. The presidency is an office of nation-wide scope. It is not a state-wide office as Mr. Hopfmann clailms. Finally, as we were reminded in argument, the purpose of the presidential primaries in the Commonwealth of Massachusetts is not to provide party nominees, but establishes the proportionality of the Massachusetts

delegations to the nominating conventions.

Plaintiffs, other than Mr. Hopfmann, have no standing to bring this action. He, at least, was a potential candidate for office. The others cannot claim that the Rule is applied against them at all. They have no personal involvement, and appear to be seeking an opinionfrom this Court of an advisory nature only, for the possible benefit of others. United Public Workers of America v. Mitchell, 330 U.S. 75 (1947) requires the conclusion of lack of standing on their part. Indeed, there is even qustion pertaining to the standing of Mr. Hopfmann. Even assuming standing, the complant must be and is hereby

dismissed.

[signature]

JOHN J. McNAUGHT
UNITED STATES DISTRICT
JUDGE

April 9, 1984

OB 49

MEMORANDUM AND ORDER ON REQUEST FOR THE CONVENING OF A THREE JUDGE COURT, in the United States District Court for the District of Massachusetts, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Civil Action No. 82-1530-MC, dated June 22, 1982, signed by the Honorable John J. McNaught.

This matter came on for a hearing on a motion for a stay. The plaintiff Alwyn (sic) E. Hopfmann and three registered voters filed suit against officers of the Commonwealth of Massachusetts and the Democratic State Committee, challenging the validity of the Massachusetts State Democratic Committee charter and its

"15% rule". The plaintiffs request the convening of a three-judge court, alleging their right to such court under 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

Similar actions have been begun by other persons in the courts of the Commonwealth of Massachusetts, and in open court on June 21, 1982, the parties advised me that issue has been joined and the matter formerly before Mr. Justice Liacos has now gone to the full bench. It appears that the issue may well be decided by the Surpeme Judicial Court and that an order may be entered by the full bench with an opinion to follow. The parties reported to me that there is no reason to believe that the Supreme Judicial Court will delay in making its decision.

After hearing, I have decided to grant a stay of this action, but have re-

quired that responsive pleadings be filed in the usual course. The stay is to expire upon the issuance of an order by the Supreme Judicial Court.

The defendants in the action before me have filed a motion to dismiss in the nature of a motion based upon a failure to file a claim upon which relief may be granted. F.R.Civ.P. 12(b)(6).

A dispute has arisen as to whether I, as a single judge, am empowered to hear and decide on a motion to dismiss under these circumstances. Upon consideration, I am of the opinion that if such a motion is to be granted, it must be granted by a court of three judges and not by the single judge who initiates the three-judge proceedings. See Svejkovsky v. Honorable Edward A. Tamm, 326, F.2d 657 (D.C. Cir. 1963).

Accordingly, I intend to request the convening of a three-judge panel to hear and determine the motion to dismiss, in the event that the ruling which eventually will be made by the Supreme Judicial Court of the Commonwealth of Massachusetts is not dispositive of the entire problem.

/S/ John J. McNaught
United States District Judge

MEMORANDUM AND ORDER DENYING PRELIMINARY INJUNCTION in a special three-judge court formed pursuant to 42 USC § 1973c and 28 USC § 2284, Alwin E. Hopfmann, et al., Plaintiffs v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC. Dated July 7, 1982.

This action came on to be heard on plaintiffs' request for a preliminary injunction and motions to dismiss by the defendants.

After argument and deliberation, the court cannot say at this juncture of the proceedings that there is a reasonable likelihood of success of the merits of the request for declaratory judgment. Specifically, the absence of a sufficient likelihood of success as to the issues of (1) whether the Commonwealth of

Massachusetts is a "covered jurisdiction" under the Voting Rights Act and (2) whether the complaint is defective in its failure to contain a good-faith allegation of racially discriminatory intent or impact requires a denial of the injunction.

July 7, 1982

/s/ Frank M. Coffin,
Chief Judge U.S. Court
of Appeals for the
First Circuit

/s/ Walter J. Skinner,
United States District
Judge

/s/ John J. McNaught
United States District
Judge

MEMORANDUM AND ORDER issued by the Honorable John J. McNaught as a single court judge below, Alwin E. Hopfmann, et al., Plaintiffs, v. Michael Joseph Connolly, Secretary of State, et al., Defendants. Civil Action No. 82-1530-MC, dated July 7, 1982.

As a single judge, I adopt the reasons set forth by the members of the three-judge court for the denial of the preliminary injunctive relief requested by the plaintiffs under the Voting Rights Act. As a single judge, furthermore, I am unable to find that there is a reasonable prospect of success on the merits insofar as plaintiffs' complaint is bottomed upon allegations of a violation of rights of plaintiffs under the First and Fourteenth Amendments of the Constitution of the

United States, or upon Articles VIII and IX of the Constitution of the Commonwealth of Massachusetts in its Declaration of Rights, or upon the theory of constitutional equitable estoppel. It is my opinion also that the plaintiff Hopfmann has not demonstrated a reasonable prospect of success on his cause of action resting upon Title 42 § 1983.

Preliminary injunctive relief denied.

The motions to dismiss on the theories of liability within the province of the single judge are under advisement as of this date.

/s/ John J. McNaught
United States District Judge

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE BRENNAN OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Your application for a stay in the above-entitled case has been presented to Justice Brennan, who has endorsed thereupon the following:

"Denied

Wm. J. Brennan, Jr.

7/8/82"

DENIAL OF PRELIMINARY STAY ISSUED BY MR. JUSTICE REHNQUIST OF THIS COURT in a letter dated July 9, 1982 from the Office of the Clerk, Supreme Court of the United States, Alexander L. Stevas, Clerk, by Katherine Downs, Assistant Clerk In Re Alwin E. Hopfmann, etc., et al. v. Michael Joseph Connolly, etc., et al. A-18.

Pursuant to your request of July 9, 1982, your application for a stay in the above-entitled case has been presented to Justice Rehnquist, who has endorsed the following on your request:

"7/9/82

Denied

WHR"

OPINION OF THE JUSTICES TO THE GOVERNOR, Supreme Judicial Court of Massachusetts. April 23, 1982. 385 Mass. 1201.

A question was propounded by the Governor of the Commonwealth of Massachusetts to the Justices of the Supreme Judicial Court with respect to the nomination of party candidates for placement on the state primary ballot. The Justices of the Supreme Judicial Court, gave answer that proposed mandatory statute providing that "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination of the state primary" would abridge the constitutional rights of the party and its members to

associate while allowing candidates to be placed on the state primary ballot in contravention of the party's charter.

Question answered.

On April 23, 1982, the Justices submitted the following answers to questions propounded to them by the Governor.

To His Excellency, the Governor of the Commonwealth of Massachusetts:

The Justices of the Supreme Judicial Court respectfully respond to the questions set forth in the Governor's request dated April 5, 1982, and transmitted to the Justices on April 6, 1982.

General Laws c. 53, § 44, as amended through St. 1981, c. 278, § 1, provides in part that "(t)he nomination of candidates for nomination at State primaries shall be by nomination papers." There is pending before the Governor for his approval

House Bill No. 5852, which would amend c.53, § 44, by inserting after the first sentence the following sentence: "Notwithstanding the charter, rule or by-law of a political party, any candidate, who is enrolled in such political party, submitting nomination papers subject to the provisions of this chapter shall be a candidate for nomination at the state primary." Article Six, Section III, of the charter of the Democratic party of the Commonwealth of Massachusetts, provides "There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the

proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election."

Stating his uncertainty "as to the necessity or constitutionality of H.5852 if enacted into law," the Governor requests, pursuant to the authority contained in Pt. II, c.3, art. 2, of the Massachusetts Constitution, as amended by art. 85 of the Articles of Amendment, the opinion of this court on the following questions of law:

> "1. Does the fifteen percent rule in the Democratic Charter supersede the current provisions of General Law, Chapter 53, Section 44, or can a candidate be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?
>
> "2. Would enactment of H.5852 allow a candidate to be placed on the Democratic State Primary Ballot by nomination papers without having received fifteen percent of the vote at the party convention?"

The constitutional provision which empowers us to answer questions propounded by the Governor, the Council, and the Legislature, restricts our authority to "important questions of law" and to "solemn occasions." Part II, c. 1, § 1, art. 2 of the Massachusetts Constitution. To preserve the principle of separation of powers, fundamental in our system of government, we are bound strictly to observe these constitutional limitations. Answer of the Justices, 362 Mass. 914, 916-917, 291 N.E. 2d 598 (1973). As the Justices have ad-

vised, "By a solemn occasion the Constitution means some serious and unusual exigency. It has been held to be such an exigency when the Governor or either branch of the Legislature having some action in view has serious doubt as to their power and authority to take such action, under the Constitution, or under existing statutes." Answer of the Justices, 373 Mass. 867, 871, 366 N.E. 2d 730 (1977), quoting from Answer of the Justices, 148 Mass. 623,625-626, 21 N.E. 439 (1889).

(1) Because question number 1 inquires only about the legal effect of the current statute in light of the Democratic party charter, and not about the Governor's authority to take action, there is no solemn occasion authorizing us to answer. Opinion of the Justices, ___ Mass. ___, ___ _ ___, Mass.Adv. Sh.

(1981) 1361, 1381-1382, 424 N.E. 2d 1092. It may well be that the Justices' answer to question number 1 would help the Governor determine the "necessity" of House No. 5852 in view of the present statute, a concern expressed in the request. However, whether the bill is necessary raises the question whether it is wise or expedient for the Governor to approve the bill. The Justices are not empowered to answer questions bearing on the wisdom or expediency of proposed legislation. Answer of the Justices, 319 Mass. 731, 734, 66 N.E. 2d 358 (1946). Opinion of the Justices, 314 Mass 767, 771-772, 49 N.E. 2d 252 (1943). Not having the authority to answer question number 1, we respectfully request that we be excused from answering it.

In the context of the Governor's expressed uncertainty as to the constitutionality of House No. 5852, we interpret question number 2 to inquire whether, if House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the Democratic State primary ballot in contravention of the party's charter. The Governor has a present duty to act on House No. 5852. Part II, c. 1 § 1, art. 2, of the Massachusetts Constitution. This duty, and the Governor's expressed doubt about whether House No. 5852 would be constitutional if he approved it, present a solemn occasion requiring our answer to the second question. See Opinion of the Justices, 314 Mass. 767, 772, 49 N.E. 2d

252 (1943).

"The (Democratic Party of the Commonwealth) and its adherents enjoy a constitutionally protected right of political association. 'There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments ... . The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom.' Kusper v. Pontikes, 414 U.S. 51, 56-57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973). 'And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States.' Williams v.

Rhodes, 393 U.S. 23, 30-31, 89 S.Ct. 5, 10-11, 21 L.Ed. 2d 24 (1968). Moreover, '(a)ny interference with the freedom of a party is simultaneously an interference with the freedom of its adherents.' Sweezy v. New Hampshire, 354 U.S. 234, 250, 77 S. Ct. 1203, 1211, 1 L.Ed.2d 1311 (1957); see NAACP v. Button, 371 U.S. 415, 431, 83 S. Ct. 328, 337, 9 L.Ed.2d 405 (1963)." Cousins v.Wigoda, 419 U.S. 477, 487-488, 95 S.Ct. 541, 547, 42 L.Ed.2d 595 (1975). "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being." Democratic Party of U.S. v. Wisconsin, 450 U.S. 107, 122n22, 101 S.Ct. 1010, 1019, 67 L.Ed.2d 82 (1981), quoting L. Tribe, American Constitutional Law 791

(1978). A determination of who will appear on a general election ballot as the candidate endorsed by an identified political party is a critical decision for that party. The party, therefore, has a substantial interest, implicit in its freedom of association, to ensure that party members have an effective role in that decision. Democratic Party of U.S. v. Wisconsin, supra.

Within the Commonwealth, the winner by a plurality of a party primary becomes that party's candidate for statewide office in the general election. G.L. c 53, § 2. Voting in party primaries is limited to enrolled party members and unenrolled voters who enroll at the polls just before receiving ballots. G.L. c. 53, § 37. Apart from Article Six, Section III, of the State Democratic party charter, in order to be placed on a party's primary

ballot, a candidate for statewide office must be an enrolled member of that party, G.L. c. 53, § 48, and submit nominating papers signed by at least 10,000 registered voters, c. 53, § 44, who may be enrolled in that party or unenrolled. G.L. c. 53, § 46. Therefore, apart from Article Six, section III, of the State Democratic party charter, a candidate for statewide election could be placed on the Democratic party ballot and win the primary, thus becoming entitled to be placed on the general election ballot as the Democratic party candidate, with little or no support from the regular party membership.[1/]

1/ As of February, 1980, 39.9% of all registered voters in the Commonwealth were unenrolled. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ____, Mass.Adv.Sh.(1981) at 97 415 N.E.2d 832.

The State Democratic party charter, Article Six, Section III, proviso that any nominee who receives at least 15% of the vote at the State convention may challenge the convention endorsement, by negative implication adds to the statutory requirement of nomination papers for placement on the primary ballot the further requirement that a candidate must receive at least fifteen percent of the convention vote. This has the double effect of limiting the number of candidates on the primary ballot, thereby eliminating the confusion that may result from too many candidates, and of limiting the candidates to those with significant party support, thereby giving the party members an effective role in choosing the party's candidate in the general election. The State has been held to have a compelling

interest in limiting the number of candidates in order to prevent voter confusion. American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-06, 39 L.Ed.2d 744 (1974). Storer v. Brown, 415 U.S. 724, 732, 94 S.Ct. 1274, 1280, 39 L.Ed. 2d 714 (1974). A political party has a parallel interest.

If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would appear to override the charter requirement of 15% of the convention vote for placement on the primary ballot and, together with c. 53, § 46, would eliminate the Democratic party's control of who its candidate in the general election would be. This would substantially infringe the right of freedom of association of the Democratic party and its members, and therefore, to pass constitutional

muster, it must serve a compelling State interest, Sears v. Secretary of the Commonwealth, 369 Mass. 392, 397, 341 N.E. 2d 264 (1975), and do so with as little infringement on constitutional rights as possible. See Riddell v. National Democratic Party, 508 F.2d 770, 776-778 (5th Cir. 1975). We must apply "strict scrutiny" to its justification and operation. Bachrach v. Secretary of the Commonwealth, ___ Mass. ___, ___, Mass.Adv.Sh. (1981) 93, 101, 415 N.E.2d 832.

The Commonwealth unquestionably has a compelling interest in the overall regularity of the election process, including limitation of the number of candidates on the ballot so as to avoid voter confusion and ensuring that the candidates whose names appear on the ballot have significant community support.

American Party of Texas v. White, 415 U.S. 767, 782, 94 S.Ct. 1296, 1306, 39 L.Ed.2d 744 (1974). This applies to the conduct of primary elections, Kusper v. Pontikes, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973), Rosario v. Rockefeller, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d L (1973), which are an important part of the procedure by which the ultimate office holder is chosen. Sears v. Secretary of the Commonwealth, supra, 369 Mass. at 398, 341 N.E.2d 264. These interests are served by the requirement that each candidate for statewide office obtain the signatures of at least 10,000 registered voters on nomination papers, G.L. c. 53, § 44, but they are not served by the elimination of a 15% convention vote requirement for placement on the primary ballot. Elimination of the Democratic party charter

requirement could only increase the number of candidates on the primary ballot, with a resulting increased potential for voter confusion.

We assume that House No. 5852 was designed to promote the integrity of the election process. Nevertheless, the Commonwealth's compelling interest in the integrity of the election process does not constitutionally justify elimination of party control over who the party's candidate in the general election will be. This view finds support in Democratic Party of U.S. v. Wisconsin, supra. In that case, the United States Supreme Court struck down a State statute that compelled the party to seat delegates at its national convention who were bound by the statute to vote on the first ballot with the results of a primary election in which any

registered voter could participate regardless of party affiliation. This was contrary to the national party rules. Wisconsin impermissibly attempted to override the national party's attempt to limit "those who could participate in the processes leading to the selection of delegates to their National Convention." Id. 450 U.S. at 122, 101 S.Ct. at 1019. General Laws c. 53, § 44, as it would be amended by House No. 5852, would attempt to override the State Democratic party's effort to ensure that regular party members have a substantial voice in the selection of its candidates for statewide office, and that, at least in conjunction with §§ 44, 46, and 37 of G.L. c. 53, is impermissible. If the law of the Commonwealth were to require that nomination papers be signed only by regular members

of the party, contrary to c. 53, § 46, or that only regular members of the party may vote in the primary, contrary to c. 53, § 44, as it would be amended by House No. 5852, would be less intrusive on a political party's constitutional rights. However, we express no opinion on whether it would be sufficiently less intrusive to be constitutionally sound, since that is not the question before us, nor need we consider whether any proviso of the Constitution of the Commonwealth might prohibit the proposed enactment.

(2) We answer question number 2, as interpreted by us above, as follows: If House No. 5852 were approved, G.L. c. 53, § 44, as thereby amended, would abridge the constitutional rights of the Democratic party and its members to associate by allowing candidates to be placed on the

Democratic State primary ballot in contravention of the party's charter.

The foregoing opinion is submitted by the Chief Justice and the Associate Justices subscribing hereto on the 23rd day of April, 1982.

EDWARD F. HENNESSEY
HERBERT P. WILKINS
PAUL J. LIACOS
RUTH I. ABRAMS
JOSEPH R. NOLAN
NEIL L. LYNCH
FRANCIS P. O'CONNOR

ORDER OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SJC-2889, dated July 6, 1982, Frederick C. Langone, et al. v. Secretary of the Commonwealth, et al.

On June 18, 1982, the Single Justice reserved and reported the following questions of law presented by this action:

1. Whether all candidates who have complied with applicable statutory requirements must appear upon the Democratic state primary ballots, notwithstanding the failure to obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth?

2. Whether the decision by the Secretary of the Commonwealth that he will not place upon the Democratic state primary ballots those candidates who failed to

obtain at least fifteen percent of the vote on any ballot of the Democratic Convention pursuant to Article Six, Section III of the 'Charter of the Democratic Party of the Commonwealth,' but otherwise complied with the statutory requirements to have their names placed upon the ballots violated the constitutional or statutory rights of the voters, the candidates, or their supporters?

Upon consideration of the argument and briefs of the parties, we interpret the State statutes in light of the State and Federal constitutions and rule that the Secretary of State must give effect to the relevant charter provisions. Accordingly, we answer the questions reported, "no."

A rescript will issue forthwith with an opinion or opinions to follow.

ARTICLE SIX, SECTION III, OF THE CHARTER OF THE MASSACHUSETTS DEMOCRATIC PARTY, adopted at Convention of May 21-22, 1982.

There shall be a State Convention in even-numbered years for the purpose of endorsing candidates for statewide offices in those years in which such office is to be filled. Endorsements for statewide office of enrolled Democrats nominated at the Convention shall be by majority vote of the delegates present and voting, with the proviso that any nominee who receives at least 15 percent of the Convention vote on any ballot for a particular office may challenge the Convention endorsement in a State Primary Election.

HOUSE BILL NO. 5852 of the State Legislature of the Commonwealth of Massachusetts (1982).

An Act ensuring that candidates nominated by nomination papers shall have access to the state primary ballot.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Section 44 of Chapter 53 of the General Laws, as amended by Chapter 136 of the Acts of 1977, is hereby further amended by adding after the first sentence the following sentence: -- Notwithstanding any party charter, rule or by-law, any candidate submitting nomination papers pursuant to this chapter shall be a candidate for nomination at the state primary.